Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES EX REL
IRWIN EISENSTEIN
PETITIONER

- vs. -

CHRISTIE WHITMAN, N.J. A.O.C.,
PSI (POLICY STUDIES INC.),
JEB BUSH, JOHN DOE, JANE DOE
RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Irwin R. Eisenstein,
601 b Surf Ave, apt 17k
Brooklyn, New York 11224
718-996-6914(h)
212-849-3321 (w)

67pp

Introduction

This action was brought using the False Claims Act, and other statutes. Petitioner is a computer expert with an economics degree. Economic models and computer systems developed by Policy Studies Inc. (PSI), state, and local government departments fraudulently omit categories and processes that would reduce child support collections. These omissions result in the Federal Government paying at least $50 million yearly in false claims.

Questions Presented

1. Did the court err when it determined that an expert opinion and the corresponding analysis was common knowledge, and plaintiff was not an original source of the analyzed information, when nobody else suggested that the economic model be modified to include omitted economic factors, and specific computer matches be performed to reduce excessive collections?

2. Did the court err when it said allegations of fraud were "wholly conclusory, and did not satisfy the heightened pleadings" required by rule 9(b) when the defendants are in exclusive control of most information, but petitioner's claims can be verified by reviewing the omissions in the economic model(s), by performing audits of the Child Support Models and computer systems and by reviewing computer generated orders sent to petitioner that included cost of living increases in child support for an emancipated 26 year old Ph.D candidate?

3. Did the Court fail to consider the jurisdictional limits of the Commerce Clause, and the plain meaning of the False Claims Act, when criteria required to establish personal jurisdiction exist and the FCA says "Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred"?

Parties To Proceedings

All named parties are included on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the decision below.

Opinions Below

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

Petitioner requested an En Banc hearing or a rehearing by the original panel of a decision by a panel of the Second Circuit. Both were denied. (The panel was composed of: Hon. Ellsworth Van Graafeiland, Hon. Guido Calebresi, and Hon. Sonia Sotomayor). This case was appealed from a decision of the District Court (S.D.N.Y., A. K. Hellerstein, J). The District Court dismissed this action for lack of personal jurisdiction, venue, for failure to be the original source of information, and for failure to allege fraud with particularity (FRCP 9(b)). The Appellate Court Affirmed (See Appendix, A Page 4 for the Second Circuit decisions, See Appendix B, Page 12 for the District Court decisions).

Subject Matter And Personal Jurisdiction Exist Based Upon This Courts Commerce Clause Decisions And The False Claims Act.

This court has jurisdiction over the appeal pursuant to 28 U.S.C. §1254(1). Both personal and subject matter jurisdiction exist. Subject matter jurisdiction is statutory, and personal jurisdiction is based upon where the action occurs, or where any of the parties do business when there are multiple defendants (See The Commerce Clause (Art. I, Sec 8, ¶ 3), and the FCA 31 U.S.C. § 3732(a)).

Constitutional And Statutory Provisions Involved

The action was brought under the False Claims Act ('FCA'), 31 U.S.C. §§ 3729 et seq., 42 U.S.C. §§ 600 et seq., The Commerce Clause (Art. I, Sec 8, ¶ 3), 42 U.S.C. §§ 1983 et seq., other federal statutes, Constitutional claims and provisions and pendant state claims.

Statement Of The Case

Justice Ginsburg of this court granted an extension until November 8, 2001 to file a petition for a writ. The Appellate court erred in their decision of February 14, 2001, and in the denial of an En Banc Hearing (June 11, 2001). The order drafted by the Federal Appellate Panel was vague in parts, overly broad in parts, and did not address the law or facts. Petitioner requests that this court review the case facts the way that the average jury would review them. It is difficult to summarize a case that was pleaded in hundreds of pages, in a small brief.

Summary of The Case

The summons and complaint was filed on December 1, 1998. The defendants are Policy Studies Inc. (PSI), Christie Whitman of New Jersey, Jeb Bush of Florida, and other parties who fraudulently failed to properly administer Child support collections.

PSI is a private company engaged in all phases of child support collection, and collects child support in seventeen states. They assist about thirty states in developing economic models used in determining child support. They develop guidelines and economic models, design computer programs and systems, and also collect child support. There is, at the very least, a

conflict of interest, and appellant alleges PSI's guidelines result in excessive collections and they in turn are reimbursed excessively. If the guidelines in one of the thirty states differ significantly from the guidelines in another state, then there is more than just a conflict of interest. PSI does business in all states.

When their model results in additional assessment of child support, PSI earns extra money when they collect child support for a state. PSI's net corporate income has exceeded $100 million dollars a year for several years, and the majority of this income is from child support collection activities. Not only is this a conflict in interest, but also petitioner alleges PSI's actions and inaction amount to fraud. PSI represents itself as economic experts but has purposely, knowingly, omitted economic factors from their model that would reduce child support. Any competent, honest, economic expert would include these factors when determining the costs of raising children. These same factors are used in other State Administered Social Service Programs where states must pay out money. Many States use dual economic models and standards, and these conflicting economic standards and models result in the over assessment of child support and in excessive collections. The Federal government pays for a large percentage of administrative costs and pays bonuses based upon the amount of child support collected.

This action is also against several governments who do not maintain proper business records, fail to perform reasonable audits in computer systems, and who fail to perform simple computer matches that would reduce child support collections (As required

by 45 C.F.R. 307).

The flawed accounting and computer systems run by state and local governments result in excessive state reimbursements. The child support economic models that PSI assists in developing, purposely omits and excludes factors that would reduce child support payments. These economic models are used in about two thirds of all states. PSI fraudulent omissions have resulted in hundreds of millions of dollars in excessive Federal reimbursements and bonuses to private companies and to local and state governments who collect child support.

This Court determined that economic models must include economies of scale when the government gives grants to the needy (See Anderson v Edwards 131 L Ed 2d 178, 115 S Ct _, 514 U.S. 143 (1995), Thomas writing for a unanimous court, see also Bowen v. Gilliard 483 U.S. 587(1987)). However, when private companies, county, local and state governments collect child support, they omit many economic factors that they use in determining grants for the needy.

One significant difference is that when local governments distribute Federal grants, they contribute to the payments, but when they collect child support, they receive bonuses based upon the amount collected. When child support collections are more successful, the local governments receive more money for both administrative expenses and as bonuses from the Federal government. The results of these economic omissions are that millions of dollars are being fraudulently paid to those entities by the Federal government as bonuses.

The Amount of Yearly Fraud Exceeds $48 Million

Approximately $25 billion dollars of child support is collected nationally each year. At least 60% of this amount is based upon economic models where PSI assists in developing the model (About $15 Billion). At least 25% of this $15 Billion or $3.75 billion should be reduced based upon economic factors omitted from models used to assess child support.

About 65% of the $3.75 billion dollars is impacted by omitted factors ($2,437,500,000) (fixed costs account for 65% of the cost of raising children). After applying some of the omitted factors, this amount collected would be reduced by at least 25% and the bonus that the Federal Government pays would be reduced by a percentage of that amount. (65% of 3.75 billion is about $2,437,500,000, and 25% of that amount is $609,375,000).

The Federal government pays a 6% bonus to each state that participates in collecting child support. About 30% of all child support is collected interstate and two states collect 6% bonuses. The total federal bonus paid for child support collection is about 8%. This 8% is composed of combining 6% and about 2% for interstate collections. The excessive bonus amount is about 8% of $609,375,000, or $48 million yearly. When additional factors are applied, excessive Federal bonus payments may be greater than $48 million dollars. The FCA can be applied retroactively. Even if penalties are not applied, the amount in controversy on a national level for seven years is about $341 million (Time governing recovery under the FCA is specified in 31 U.S.C. § 3731).

The Federal Government also pays at least 66% of state administrative costs associated with child

support collection, and frequently pays between 80-90% of all costs associated with the development, maintenance, and running of computer systems that are used for child support collection.

Child Support Collection Is Actionable Using The Commerce Clause.

When a state collects child support for another state, then each state receives at least 6% of child support collection as a bonus payment. New York State collected at least $60 million for interstate child support orders. This Court specified factors for bringing an action under the Commerce Clause of the Constitution (See U.S. v Lopez, 514 U.S. 549(1995)), and U.S. v. Morrison, 120 S.Ct. 1740 (2000)).

These factors allow one to establish personal jurisdiction for parties from other states who are involved in the collection of interstate child support. The majority of Federal Appellate Courts Justify the Constitutionality of the Child Support Recovery Act (C.S.R.A. 18 U.S.C. § 228) using the Commerce Clause, but the Second Circuit refused to consider the improper assessment and collection of child support as being an issue that can be raised using the Commerce Clause! They used a double standard. Fraudulent Interstate Child support collection satisfies the Commerce Clause criteria for a Federal action.

Reasons For Granting The Petition

Argument I - The Court Erred By Saying That An Expert Opinion And The Corresponding Analysis Is Common Knowledge, And Plaintiff Was Not An Original Source Of The Analyzed Information.

Plaintiff, an expert in computer systems, has designed computer matches to detect fraud in government programs. He has a graduate degree in computer science, has a degree in economics, and has done extensive computer auditing and statistical analysis. However, in this case, the decision said anyone could have done the computer, economic, and procedural analysis, and that there was "common knowledge" about economic and computer omissions that result in fraud that was not being addressed by any Federal auditors? Alternatively, the Federal Agency and auditors responsible for monitoring systems were acting incompetently. They should have had access to the information since the court said the plaintiff was not an "original source of the information".

These omissions and the failure to act are because petitioner's proposals are not "common knowledge" as determined by the Second Circuit. If they were common knowledge than others would have raised the same issues related to systemic deficiencies.

By failing to design and run computer matches that are used in other similar government programs to reduce benefits, child support collections are excessive, federal administrative payments and bonus payments are excessive, and there is fraud. Excessive payments are made in New York when New York entities collect money for both Florida, and

for New Jersey. If this action were to be tried, actions could be commenced in at least six other states that are using the PSI based economic model.

Rules Of Evidence Defined By This Court In Daubert, And Kumho Tire Allow A Computer Expert To Make Factual Statements About Computer Systems Omissions.

The Second Circuit erred when it said information presented by plaintiff was publicly disclosed information and petitioner was not the original source of information. The court did not understand the analysis presented by petitioner and never explained why the methods and approaches suggested were not currently in use.

Petitioner combined and analyzed information from different sources. Although individual information was available, the analysis was not available, and the information was not combined in any public documents. Computer matches that use available databases would assist in reducing child support collections. The matches are based upon computer matches and databases used in other social service programs, and upon economic models that are different from the ones used in the child support collection models. These economic models proposed by petitioner were accepted by this court in Anderson and Bowen supra. These economic models are available and are subject to peer review.

Petitioner brought together information from economics, accounting, computer science, and law that was not reviewed or combined before his presentation. The approaches submitted by petitioner can be tested, are subject to peer review, and use standard methodologies that have not been applied to

Child Support Collection Databases and systems. The analysis and suggestions would result in hundreds of millions of dollars of federal savings.

In Daubert v Merrill Pharmaceuticals, Inc. 509 U.S. 579 (1993) and Kumho Tire Company, Ltd. v Carmichael 526 U.S. 137 (1999) this court defined factors to use when evaluating the acceptability of evidence. Three tests the court suggested when reviewing expert opinions are:

(1) Can the approach be tested;

(2) Whether it can be subjected to peer review and publication;

(3) Whether standards exist controlling its applicability and the known and or potential error rate of the methodology.

Testimony must be based upon sufficient facts or data, be the product of reliable principles and methods, and insure that the "witness applied the principles and methods reliably to the facts of the case." Expert testimony in this case satisfies these tests. Petitioner has designed computer programs used to detect fraud in social service agencies. Any approach that was suggested can be tested; can be subject to peer review, and standard methodologies. The methods proposed have not been used because they would result in a reduction of federal funding to the parties who collect child support. These defendants have conflicts in applying this simple methodology because it would reduce federal funding to their programs.

In Anderson and in Bowen supra this court accepted and applied the principles of "economies of scale" to household expenses when allocating costs to household members.

The lower courts dismissed this action based upon FRCP 9(b). The facts alleged should be self-evident. PSI as economic experts had a duty and obligation to inform governments that the approach that was used did not meet the standards used in economic models when there are changes in circumstance. PSI failed to act responsibly as economic experts. Rule 9(b) is not applicable when the allegations are clear and the petitioner requested discovery of information in the exclusive control of the defendants. (Petitioner had access to some information and could easily determine that the allegations specified in the complaint are true. Petitioner is still paying cost of living increases, recently allocated by New Jersey, for a 26 year-old son who was emancipated by court order more than four years ago.)

The Appellate Order Conflicts With The FCA.

Parts of the Appellate order are contrary to the plain meaning of the statute (See 31 U.S.C. § 3730 Section(e)(4)(A)). This section bars actions based upon information already available after allegations, audits, or investigation. The section says:

> (4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Petitioner relied upon the absence of information, computer matches, procedures and categories excluded from economic models, not from the public disclosure of information from any investigation. Plaintiff had personal knowledge about the inadequacies in computer matches and did independent research. If the court believed that the information presented by the petitioner is public information, then they should have reported it to the proper authority for review and implementation. Petitioner has been designing computer systems to detect fraud in public programs for about twenty years. He has special skills, training, and information not available to the general public. Petitioner's action, analysis, reviews, personal information, and statistical review were developed based upon the absence of information (Plaintiff was the original source of the information and of the analysis). The court said in the Feb. 14, 2001 order:

> "the FCA bars courts from hearing qui Tam suits based on publicly disclosed information where the plaintiff was not an original source of the information"

PSI, Economic Experts, Knowingly Omitted Factors In Their Model That Would Reduce Child Support.

PSI excludes factors from their economic model that reduce child support. These factors, in some cases, influence a larger number of households than the factors that are included in their model (remarriage, cohabitation, emancipated child in the household, and long-term housing impacts are excluded from PSI's model.).

To develop this action plaintiff used information from economic models, computer science, law, and auditing and developed the information and analysis based upon his unique experiences and information. The Appellate Panel, with an economics expert as a member, did not recognize that PSI's economic model purposely omitted factors. Economies of scale were limited in the model, and there are resulting very significant federal overpayments (see Anderson, also Bowen v. Gilliard 483 U.S. 587 (1987)).

The Complaint Included Economic Factors That Were Omitted From Child Support Models That Resulted In Child Support Overpayments.

Some issues raised in this complaint follow.

1. New Jersey fails to automatically include individuals in household budgets or to consider economy of scale when there is a change in circumstance like a remarriage, or when an emancipated child continues to live at home. The failure to use the same economic standard in child support collections, as in other Federal programs administered by the state and counties results in over assessments of child support and excessive Federal bonus payments.

2. New Jersey continues to automatically collect and assess cost of living increases for emancipated children, without any pre-deprivation hearing.(See Fuentes V. Shevin, 407 U.S. 67 (1972); See also Goldberg v. Kelly, 397 U.S. 254(1970)). These costs of living increases affect parties in other jurisdictions (Foreign). "Due Process" does not apply in these ex parte administrative adjustments.

3. When a child leaves school (high school or college), the child or the custodial parent knows about the event. The failure to report this change in circumstance results in over payments of child support, and excessive Federal reimbursements. (In Welfare Systems, State and local governments require recipients to report changes in circumstance so that grants and benefits can be re-evaluated!)

4. New Jersey fails to allow, in practice, a rebuttable presumption on the low end of the child support spectrum. In some cases, New Jersey courts have knowingly assessed child support to parties in other states who were collecting welfare payments based upon Federally recognized disabilities. (See 42 U.S.C. § 667(b), and The Supremacy Clause, Article VI, Section [2]).(Federal question - some states do allow a rebuttable presumption when a party is at or below the poverty level. (Compare Rose v Moody, 83 N.Y. 2d 65(1993)).

5. Child support arrears are assigned by State Court actions where a court determines that a party owes past due child support. The arrears should be collected regularly until all arrears are collected. At that time, just like a bank loan, the collection system should automatically terminate collections. New Jersey, and "County Governments" continue to collect child support arrears after the total amount owed was collected. Arrears are not automatically terminated when amounts are paid in full. This results in over collection, extra bonuses, extra expenses, and fraud against the Federal government.

6. Florida's fails to match child support collections and school graduates and dropouts databases. This results in child support collection after a child is, by Florida law, emancipated. Extra child support payments result in bonuses and additional funds for administrative expenses (37 states emancipate children at 18, or upon graduation from high school (before 19). Florida continues to improperly collect from parties from other jurisdictions after children are emancipated. Florida performs at least 20 computer matches to find parties who owe child support all over the country, and use information from National Databases to initiate actions nationally.

7. PSI assists in, and develops many state child support guidelines and laws. PSI collects child support in at least 16 states. PSI fails to include significant groups in the economic models used to develop their guidelines that would reduce child support. They collect excessive child support and the money that they receive for collection is excessive. Several economic experts question the PSI analysis that excluded groups, and economies of scale. PSI's failure to include or exclude groups in their models results in excessive collection, and fraud against the Federal government. Some factors PSI exclude follow.

a. Emancipated children who remain at home, contribute to the household, and impact fixed costs.

b. When there is a remarriage (or cohabit), the new party in the household should be included when calculating costs (at least 16% of all custodial parents remarry, or cohabit (U.S. Census 1990)). States are a party to marriages and know there is a change in circumstance (States keep computer records of marriages, and also of child support). A simple

computer match would identify households where circumstances change.

c. There are very few adjustments for household expenses in child support guidelines. When a couple has been in a house for a very long time, and have a low mortgage, child support may be excessive (Housing is a significant factor used when calculating child support(25%)). When housing costs are lower, then child support should also reflect lower housing costs. Housing costs are lower when shared by additional household members.

The economic models and child support standards developed with PSI's assistance exclude factors that would reduce child support. This justifies questioning PSI's behavior as economic experts. PSI benefits from excessive, fraudulent claims. Other state and county administered Federal Programs do include and use some of the factors that PSI excludes, and do computer matching to find fraud. These same factors and computer matches are not used by PSI or their state models and systems. State and county systems fail to do simple computer matches that would result in significant reductions in amounts collected. (See Computer Matching in State Administered Benefit Programs, HHS. This is a guide supplied by Health and Human Services provided to assist states in defining criteria to use for computer matches to detect fraud and to reducing grants.)

Petitioner while doing research on the Internet discovered a letter written by PSI's President that was sent to the state of Ohio (Dec. 16, 1996) saying that PSI does not include any allowance for child support payments when a child is with the non-custodial

parent (vacation time, weekends, midweek visits). When questioned about this factor, PSI's president said he did not consider this an important factor when calculating child support and discounted it! Petitioner alleges that PSI never sent copies of this letter explaining their position to other states that use their economic model (See Appendix C).

Argument II The Court Erred By Saying Allegations Of Fraud Were "Wholly Conclusory, And Did Not Satisfy The Heightened Pleadings" Required By Rule 9(B), But Did Not Allow Discovery Even Though Most Information Was In The Exclusive Control Of The Defendants.

There was no discovery, and most information was in the exclusive control of the defendants. However, the petitioner does have exclusive information about improper, unlawful, and fraudulent procedures followed by New Jersey entities that violate Due Process (See Fuentes V. Shevin, 407 U.S. 67 (1972)).

This issue was raised before the Second Circuit. New Jersey without any hearing, increases child support based upon cost of living increases even though the parties being assessed are in other jurisdictions. These increases are collected in New York and other states based upon the Full Faith and Credit Clause of the U.S. Constitution (Article IV, Section [1]).

Defendants Are In Exclusive Control of Information About Procedures and Matches Used.

Recently, based upon ex-parte administrative procedures, New Jersey's Essex County allocated a

cost of living increase and increased petitioner's child support. This increase was based, in part, on child support for a 26 year old, emancipated Ph.D. Candidate (Petitioners son). There was no hearing before this increase. Petitioner demanded a hearing more than six months prior to this unlawful "taking". However, the administrative procedures sent to petitioner and to every other party do not allow for a pre-deprivation hearing. New Jersey procedures are limited and systemically fail to allow objections before ex-parte child support increases. The procedures used advise that parties bring actions to court after the increase takes place. Petitioner objected to this procedure to the administrative authorities, in writing(at least 4 letters), but they refused to grant a hearing. It appears "Due Process" exists in these United States except in parts of New Jersey!

The petitioner has overpaid child support arrears for about five (5) years in New Jersey. New Jersey and county governments fail to keep verifiable computer or business records in their child support collection systems. They do not, or did not track Child Support arrears payments and continue to collect arrears after they are fully paid.

Many competent economic experts (including this court) would include the categories that were omitted from the child support economic models PSI developed. The economic categories account for larger numbers of cases than categories included in parts of PSI's model. This is a matter of fact. Disputed facts are issues that should be left to a jury. A court may request the assistance of an independent expert (see FRE- Rule 706). The courts failed to recognize facts that are self evident, and that would

be accepted as Judicial notice in other situations. This Court in several decisions supra, included the same categories that petitioner noted in his economic reviews, including economies of scale associated with changes in household composition.

The Second Circuit was asleep at the wheel, or alternatively buried their heads in sand like ostriches to make politically correct rather than lawful decisions. They suggested that petitioners pleadings were "Wholly Conclusory, And Did Not Satisfy The Heightened Pleadings" required by FRCP 9(b).

In U.S. ex rel Edwardo Enriche Vallejo v Investric Inc, et al 2 Fed Supp 2d 330,332 the court defines criteria to use for relaxed pleadings:

> "9(b) Pleading requirements are relaxed somewhat when relevant facts are peculiarly within opposing party's knowledge but in those circumstances, pleaders must allege that necessary information lies within defendants control and must provide statement of facts upon which allegations are based."

At 2 Fed Supp 2d 336 the court said:

> "This requirement is relaxed somewhat when the relevant facts are peculiarly within the opposing party's knowledge" Wexner v First Manhattan co. 902 F.2d 169, 172 (1990 2nd Cir). Pleader must allege that the necessary information lies within the defendant's control and must provide a statement of the facts upon which the allegations are based DiVittorio, 822 F.2d. at 1247)"

Computer Matches Should Be Used To Detect Fraud

Most systems that try to reduce government spending include computer matches used to detect changes in circumstances that are used to reduce

expenditures. Federal Auditors frequently require political subdivisions to perform matches to detect fraud (Most states do computer matches in Medicaid and Welfare systems.). Frequently, government(s) require individuals to sign affidavits to report all changes in circumstances. No such affidavit is included or required in child support collections where parties receive money and fees are based upon collected amounts. Types of changes in a household that are reported in other programs include: a cohabitation or shared household, new income in the household, any significant change in the household composition. Plaintiff discovered that these types of matches are not used in child support systems where local governments receive federal reimbursements and bonuses.

Argument III The Second Circuit Failed To Consider The Jurisdictional Limits Of The Commerce Clause, And The False Claims Act When The Criteria, And The Facts Required For Personal Jurisdiction Exist.

The Commerce Clause Allows Jurisdiction in New York

The Appellate Court agreed with the district court that "Bush, Whitman, and AOC lack sufficient contact with New York to establish personal jurisdiction." Specifically, the court determined indirectly that the Commerce Clause (Art. I, Sec 8, ¶ 3) was not applicable to the collection of child support. The Court said there was no personal jurisdiction. However, the Second Circuit in other decisions found parties could be brought to New York using the Commerce Clause when a party failed to pay child

support for a child living in New York(See United States v. Sage, 92 F.3d 101, 104-07 (2d Cir. 1996), cert. denied, 117 S. Ct. 784 (1997)). In Sage, the Second Circuit said child support Collection met the criteria to establish personal jurisdiction using the Commerce Clause.

This Action Meets The Criteria For Personal Jurisdiction In New York Under The Commerce Clause As Enumerated In Lopez, And Morrison.

Several actors from around the country, have child support collected for them in New York, without any New York court proceedings, and have availed themselves of New York forums. The collection of child support by these parties meet criteria specified in both Lopez (U.S. v Lopez, 514 U.S. 549(1995) and in Morrison (U.S. v Morrison, 120 S. Ct. 1740(2000). The commerce clause "precedent conditions" exist in this action when collecting interstate child support.

False claims are based upon unlawful, excessive claims and bonuses that are being submitted in New York, by New York entities even though the child support was requested from actions in other states (The false claims are also made in the originating jurisdiction). Both states that participate in interstate collection receive a 6% bonus payment and about 30% of all child support collection is interstate. New York has about 10,000 interstate collection cases (See footnote 1 in King (infra). If each child support order results in collecting $500 a month, New York collects at least $60 million yearly for other states.

The King decision is contrary to the Second Circuit decision in United States v. Sage, 92 F.3d 101, 104-07 (2d Cir. 1996), cert. denied, 117 S. Ct. 784

(1997). In Sage, the court said the Child Support Recovery Act (CSRA) was constitutional under congresses "Commerce Power". However, Judge Sweet found the CSRA unconstitutional (18 U.S.C. § 228). In U.S. v Eric King, (QDS:02763526(SDNY)), Judge Sweet said the CSRA was unconstitutional based upon the Morrison decision, which was decided after Sage. Judge Sweet said:

> "In Morrison, the Supreme Court warned against overly elastic conceptions of the Commerce Clause that would give Congress authority over "family law" and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and child rearing on the national economy is undoubtedly significant."

This action is distinguishable from Sage, and King. The defendants who request that New York actors collect child support for them meet several of the criteria specified for commercial activity in Lopez and Morrison. Judge Sweet said the CSRA does not fall into any of the three permissible areas of commerce as defined by the Supreme Court. This court listed the following criteria that do not satisfy the Commerce Clause:

"(1) is not a misuse of the channels of interstate commerce; (2) does not put the instrumentalities of interstate commerce at risk; and (3) does not "substantially affect" interstate commerce..."

Child Support Collected By Large Private Companies and Government Department(s) "Substantially Affect" Interstate Commerce.

Sage reviewed the actions of one person but did not review the actions of groups who influence thousands of interstate cases. In collecting child support the defendants "substantially affect" interstate commerce. Nationally, about 30% of all child support collections in the country are interstate. Nationally, Child Support collection results in more than 25 billion dollars being collected. More than 7.5 billion dollars is collected from interstate collection processes (30% of 25 billion).

The Federal government spends at least 5 billion dollars in collecting child support. The Federal Government pays at least 66% of all state administrative costs related to child support collection (At least 3.3 billion dollars). The bonuses paid for the amount collected is about 6% of 17.5 billion (70% of 25 = 17.5 billion) or about 1 billion dollars. Additionally, the Federal Government pays 12% of the $7.5 billion dollars of interstate collection as bonuses (About 1 billion dollars). Both states receive a 6% bonus when child support is interstate.

The amount of Federal money spent for child support collection exceeds 5 billion dollars. Federal grants are awarded to states and private companies for developing and maintaining complex computer systems used for child support collection and enforcement systems (The Federal Government funds between 80% and 90% of the costs of computer systems (See 45 C.F.R. 307.30-31)).

Fraudulent Child Support Collection Results In A Misuse Of "The Channels Of Interstate Commerce"

Fraudulent over-collection of child support is "a misuse of the channels of interstate commerce". PSI, economic experts, and other defendants regularly, purposely, omit criteria from their economic models that would reduce child support (ex. remarriage, others living in the household including emancipated children). These same omitted economic criteria are used in other programs where states pay out grant money. (See Anderson v Edwards 131 L Ed 2d 178, 115 S Ct _, 514 U.S. 143 (1995) see also Bowen v. Gilliard 483 U.S. 587, 97 L. Ed.2d 485, 107 S. Ct. 3008(1987)). It appears that government departments (city, county, and state) and private companies omit economic factors when they collect money from the Federal government. They include these same factors when they pay grants from their own treasuries and these same economic factors reduce payments! When excessive child support is collected interstate, than Commerce Clause criteria exist to establish jurisdiction.

The FCA Defines When One May Exercise Personal Jurisdiction.

The FCA in 31 U.S.C. § 3732(a) is clear about jurisdiction. The definition, is explicit, and establishes personal jurisdiction for all parties in this action. The statute says:

> 3732. False claims jurisdiction (a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants,

any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

The Statute recognized that False Claims frequently cross several judicial districts and recognized that multi-district litigation should be consolidated. PSI does business in New York. Any other defendants in the action could have been brought into New York based upon the plain meaning of this statute. The justification for this section was to preserve resources. It is illogical to litigate a cause of action in separate states based upon issues that emanate from the same set of material facts and circumstances.

When congress drafted the FCA statute, it recognized that any fraudulent act against the United States should allow discovery anywhere in the country, and even in other countries. The FCA grants power to an investigator to serve a CID anywhere within the Jurisdiction of any U.S. Court. The statute says:

> 31 U.S.C. § 3733. Civil investigative demands
> (c) Service; jurisdiction. (1) By whom served. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

Several different parts of the FCA recognize that False Claims, where the United States is a party, may

involve defendants all over the country. The FCA was drafted to allow courts to consolidate actions. It makes no sense to start actions in each jurisdiction, and then request a court to consolidate actions.

Argument IV - The Lower Courts Erred When They Determined PSI Had Not Acted Under Color Of Law, Failed To Limit The Order To New Jersey, Failed To Address Complicity, 42 U.S.C. §1986, And Failed To Address 'Knowingly' And 'Failure To Act' As Defined In The FCA.

The court order dismissed the claims against PSI under 42 U.S.C. § 1983, 1985, and 1988, but did not limit this dismissal to New Jersey. In seventeen other states, PSI collects child support and in more than Thirty States developed or assisted in developing child support guidelines, laws, and Child Support Systems. Without specificity in the order, PSI can use this order under the doctrines of Collateral Estoppel, and or Res Judicata all over the country. Without discovery, the Court erred in dismissing the 42 U.S.C. § 1985 claim against PSI.

The Appellate order failed to address 42 U.S.C. § 1986. PSI as experts has a duty to review and report the omissions in the New Jersey Child Support guidelines, but they did not. In other areas where child support was excessive, PSI failed to notify states of their omissions. Based upon PSI's omissions, the Federal government has paid hundreds of millions of dollars in excessive bonuses, and in administrative expenses.

The FCA defines a false claim based upon knowingly causing a false record to be used when making a claim. The statute says:

31 U.S.C. § 3729. False claims

(a)(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

The FCA defines knowingly as follows:

31 U.S.C. § 3729 (b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information-- (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

PSI, as economic experts, knowingly failed to modify the Child Support Guidelines to include factors that should be used in calculating the distribution of household expenses. This resulted in false statements and records being submitted to the Federal government for payments.

The Appellate Court Did Not Address 42 U.S.C. §§ 602 Et Seq. Which Is Designed To Prevent Fraud In Child Support Collection Systems

The Appellate court never reviewed the omissions in Government systems in this case, and therefore never addressed the fraud in the New Jersey and Florida Child Support Collection Systems. 42 U.S.C. § 602 was drafted by congress to prevent and stop the rampant fraud and mismanagement of state systems that were funded by the federal government.

The Child support collection agencies jobs were used for political patronage. 42 U.S.C. § 602, identifies

fraud and nepotism in state government, and by intent, allows a cause of action that is both public and private. In 42 U.S.C. §§ 602 et seq., the legislative intent required that state and private actors waive immunity, and certify their programs. Parts of the statute say:

> 602(e)(2) of this title. (B) Special provisions
> (6) Certification of standards and procedures to ensure against program fraud and abuse. A certification by the chief executive officer of the State that the State has established and is enforcing standards and procedures to ensure against program fraud and abuse, including standards and procedures concerning nepotism, conflicts of interest among individuals responsible for the administration and supervision of the State program, kickbacks, and the use of political patronage.

The defendants Policy Studies, Inc. ("PSI"), New Jersey Administrative Office of the Courts ("AOC"), Jeb Bush, Christine Whitman, and others failed to adhere to the plain meaning of the law, and committed fraud.

Justice Ginsberg in a concurring decision in the Stevens case on May 22, 2000, said the Federal government may bring an action against a state under the False Claims Act (Vermont Agency Of Natural Resources V. U.S. Ex Rel. Stevens No. 98–1828 (2000)). However, the question in this action is when states waive immunity can an action be brought on behalf of the Federal Government by an individual. 42 U.S.C. § 602 required that the highest state

executive insure that the state child support collection system was free from nepotism and fraud. This provision was provided in the statute because the child support systems were not efficient, cost more to run than was collected, and failed to follow standard business procedures. Jeb Bush and Christie Whitman were required to sign certifications to follow Federal law, but the systems in their states are deficient.

Multidistrict Litigation Should Be Consolidated.

The Appellate decision does not serve judicial economy and failed to address multidistrict litigation(28 U.S.C. § 1407(c)(2)). Plaintiff can bring this action in at least two states where government departments (State, City, and County) have purposely failed to develop computer systems that would detect fraud even though similar programs exist for other social service programs in those states.

In multidistrict litigation, like Qui Tam, the statute recognizes that when there are several defendants, the action may be brought in any jurisdiction where one of the defendants does business. The lower courts erred by not using the plain meaning of the statute. It is unreasonable to suggest that the statute requires actions be filed in several different states and then be combined. For judicial economy, the court should not require that Federal fraud actions be brought in several states and then combined when the actions are based upon a common set of material facts.

The decisions said there was no personal jurisdiction over several parties. It did not address any issues of fact, policy or practices in any other districts, and did not address Federal Statutes that

have been interpreted in different ways by several Federal Courts. The order issued by the appellate forum was vague, and can be used to protect a company that has knowingly committed fraud, or assisted in fraud against the Federal Government amounting to billions of dollars.

Conclusion

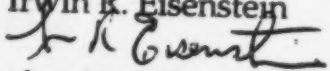
Based upon The foregoing analysis, the judgment of the United States Appellate Court for the Second Circuit should be reversed. Fraudulent claims amounting to hundreds of millions of dollars were submitted to the United States. There is regular, systematic fraud in many State Child Support systems.

In the child support computer and manual systems in New Jersey and Florida simple computer matches would terminate or lower child support and the excessive federal administrative funding and bonuses would be reduced.

The same justification-allowing jurisdiction using the Commerce Clause for the CSRA should be used in this action to allow recovery based upon child support collection fraud.

The Writ of Certiorari should be granted.

Respectfully submitted
Irwin R. Eisenstein



Date: October 25, 2001

Appendix A **Page**

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APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Area code 202
WILLIAM K. SUTER **479-3011**
CLERK OF THE COURT

AUGUST 27, 2001

Mr. Irwin R. Eisenstein
601B Surf Avenue
Apartment 17K
Brooklyn, NY 11224

Re: Irwin Eisenstein
v. Donald T. DiFrancesco, Acting
Governor of New Jersey, et al.
Application No. 01A166

Dear Mr. Eisenstein:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on August 27, 2001, extended the time to and including November 8, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
By /s Melissa A. Blalock
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Area code 202
479-3011

WILLIAM K. SUTER
CLERK OF THE COURT

NOTIFICATION LIST

Mr. Irwin R. Eisenstein
601B Surf Avenue
Apartment 17K
Brooklyn, NY 11224

Mr. John J. Farmer Jr.
Richard J. Hughes Justice
Complex, 25 Market Street CN112
Trenton, NJ 08625

Clerk
United States Court of Appeals for
The Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECENDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14 day of Feb. two thousand and one.

PRESENT:

HON. ELLSWORTH VAN GRAAFEILAND,
HON. GUIDO CALEBRESI
HON. SONIA SOTOMAYOR,
Circuit Judges.

FILED
FEB 14 2001
SECOND CIRCUIT

IRWIN EISENSTEIN,
Plaintiff -Appellant,

SUMMARY ORDER

#00-6051

v

CHRISTIE WHITMAN, NEW JERSEY ADMINISTRATIVE OFFICE OF THE COURTS, PSI TECHNOLOGIES INC. (POLICY STUDIES INC.), JEB BUSH, JOHN DOE, JANE DOE,

Defendants-Appellees.

End Page 1

United States ex rel. Eisenstein v Whitman
No. 00-6051
Page 2

For Appellant: Irwin Eisenstein,
Brooklyn, NY, Pro se

For Appellees Whitman and
New Jersey Administrative
Office of the Courts: Michael J. Haas,
Assistant Attorney General
(George N. Cohen, on the brief),
for John J. Farmer, Jr.,
Attorney General of New Jersey,
Trenton, NJ.

For Appellee Bush: Sara A. Genzel-Steffen, Assistant Attorney General, for Robert A. Butterworth, Attorney General of Florida, Tallahassee, FL.

For Appellee PSI: Andrew W. Loewi, Brownstein Hyatt & Farber, P.C., Denver, CO.

Appeal from the United States District Court of the Southern District of New York (Alvin K. Hellerstein, District Judge).

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and hereby is AFFIRMED.

Irwin Eisenstein appeals from the district court's (Hellerstein, J.) dismissal of his suit, under the False Claims Act ("FCA"), 31 U.S.C. § 3729, and 42 U.S.C. §§ 1983, 1985, and 1988 against Governor Jeb Bush, Governor Christine Whitman, the New Jersey Administrative Office of the Courts ("AOC"), and Policy Studies, Inc. ("PSI"). Eisenstein also appeals from the district court's denial of a motion for reconsideration, and moves this court for a writ of coram nobis, for sanctions, and for inclusion in the record of allegedly newly discovered evidence.

As the district court found, Bush, Whitman, and the AOC lack sufficient contacts with

End Page 2

New York to establish personal jurisdiction.[1] In addition, because the FCA bars courts from hearing *qui tam* suits based on publicly disclosed information where the plaintiff was not an original source of the information, there is no subject matter jurisdiction over PSI as to the FCA claims. We also agree with the district court that because PSI is not a state actor and did not act under color of state law or as part of a conspiracy, Eisenstein's claims under §§ 1983, 1985 and 1988 must fail. Finally, the district court correctly determined that Eisenstein's allegations of fraud against PSI were wholly conclusory and did not satisfy the heightened pleading requirements for fraud set our in Rule 9(b) of the Federal Rules of Civil Procedure [2]

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[1] In the original order, the district court dismissed the claim against Bush for lack of venue. In subsequent orders, however, the court clarified that the claim was dismissed for lack of personal jurisdiction.

[2] The district court did not explicitly address Eisenstein's claims against John Doe and Jane Doe. When, however, an action is dismissed as to all defendants who have been served and only unserved defendants "remain," as is the case here, the entry of a final judgment is not precluded "since there is no basis for believing

Denial of Eisenstein's Motion of reconsideration was well within the district court's discretion. See Devlin v Transp. Communications Int'l Union, 175 F.3d 121, 132 (2d Cir. 1999)(stating that the standard of review for denials of a motion for reconsideration is abuse of discretion).

We have considered all of plaintiff's arguments, and find them to be without merit. The judgment of the district court is therefore AFFIRMED, and all of Eisenstein's motions to this court are DENIED.

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there will be any further adjudications in the action, or ... for holding the dismissals subject to revision." Leonhard v United States, 633 F.2d 599, 608 (2d Cir. 1980).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the united States Court house, Foley Square, in the City of New York, on the eleventh day of June two thousand one.

----------x

US ex rel Eisenstein

Dkt No: 00-6051

FILED

Appellant

JUN. 11, 2001

V

ROSEANN B. MACKECHNIE
CLERK

Whitman et al

Appellee

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A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant IRWIN EISENSTEIN,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By:/s Beth J. Meador,
Administrative Attorney

p o ccc
Inbancdn_frm

Appendix B **Page**

District Court Order Dismissing Florida and PSA Dated: Dec. 6, 2000 12

District Court Order Denying Reconsideration of Order against PSI and Florida Dated: Dec. 28, 1999 16

District Court Order Dismissing the action Dated: Dec. 29, 2000 18

District Court Order Confirming Dismissal of the complaint Dated: Jan 31, 2001 ... 20

APPENDIX B

United States District Court
Southern District New York

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UNITED STATES, ex rel. IRWIN EISENSTEIN

Plaintiff-

AGAINST -

CHRISTIE WHITMAN,
NEW JERSEY ADMINISTRATIVE
OFFICE OF THE COURTS,
PSI TECHNOLOGIES INC.
(POLICY STUDIES INC.),
JEB BUSH,
JOHN DOE, JANE DOE
Defendants.

----------x

SUMMARY ORDER

No. 98 CIV 8448(AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

The parties appeared for oral argument on Friday, December 3, 1999 at 12:00 p.m. in Courtroom 14D at 500 Pearl Street, New York, New York 10007.

By notice of motion dated September 8, 1999, Defendant Policy Studies, Inc., ("PSI"), moved this court to dismiss Plaintiff's action pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff alleged that under color of law, PSI violated his rights as provided by §§ 1983, 1985, 1988 of Title 42 of the United States Code. All that has been shown, however, is that PSI was a consultant for the state of

New Jersey. As no state action was involved, Defendant's motion to dismiss these causes of action is granted.

Plaintiff also alleged violation of the False Claims Act, 31 U.S.C. § 3729 et seq. Plaintiff contends that PSI's child support guidelines are "facially flawed, and discriminatory," (Amend. Compl. ¶ 24), and that the state of New Jersey wrongly relied on these guidelines in calculating Plaintiff's child support payments (Id. ¶ 23), thus resulting in the collection of excessive child support. Plaintiff also charged PSI with "negligently and fraudulently failing to follow a

End Page 1 of the Order

standard of care" in formulating its guidelines. Id. ¶ 98. Although, Plaintiff alleged, that in his view, PSI's economic models were flawed, he did not allege fraud or any activity on the part of PSI that constituted a false claim.

The only evidence of PSI's involvement with the state of New Jersey are two professional service agreements. In the first, effective from November 1, 1994 until January 1995, PSI undertook to "provide consulting services through Dr. Robert G. Williams to the Supreme Court Family Practice Committee's Subcommittee on Child Support" and to Prepare a report which includes revised child support guidelines" for New Jersey. Pl. Exs. 1, 2. PSI's compensation under the agreement could not exceed $9,999.99. Id. The second service agreement, effective January 20, 1997 through February 10, 1997, provided that PSI would "reproduce the proposed child support

award schedule using New Jersey income distributions, adjust the net income figures through December 1996, and provide an explanation of the conversion models." Id. Compensation for these services was not to exceed $2,270.00 Id.

Plaintiff's action, therefore, fails under Rule 9(b) of the Federal Rules of Civil Procedure because there is no sufficient allegation of fraud, even allowing for laxity in the pleadings since Plaintiff is *pro se;* nor could there be for the reasons stated above.

Defendant Jeb Bush by notice of motion dated October 12, 1999 moved to dismiss Plaintiff's Amended Complaint. According to 31 U.S.C. § 3732(a) actions brought pursuant to § 3730 of the False Claims Act "may be brought in any judicial district in which the defendant.... Can be found, resides, transacts business, or in which the act proscribed by section 3729 occurred." Plaintiff failed to allege sufficiently that Defendant Bush or the state of Florida falls within any of these requirements. The Court declines to reach the issue whether and to what extent the Eleventh Amendment can bar this alleged qui tam lawsuit where the Department of

End Page 2 of order

Justice has declined to participate. See United States ex rel. Stevens v State of Vermont Agency of Natural Resources, 162 F.3d 195 (holding that qui tam False Claims Act suit is not barred by the Eleventh Amendment), cert. granted 67 U.S.L.W. 3717, 3775, 3784(U.S. June 24, 1999) (No. 98-1828).

For these reasons and the reasons stated on the record, PSI's motion to dismiss for failure to state a

claim on which relief may be granted and for failure to plead fraud with particularity is granted. Defendant Bush's Motion to dismiss for lack of venue is also granted. Plaintiff's motion for sanctions is denied as is Plaintiff's motion that I waive judicial immunity. Defendant Bush's motion for fees and costs is also denied. The Court denies Plaintiff's motion for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

SO ORDERED.

Dated: New York, New York
December 6, 1999

/s ALVIN K. HELLERSTEIN
United States District Judge

United States District Court
Southern District New York

----------x

UNITED STATES, ex rel. IRWIN R. EISENSTEIN — ORDER DENYING RECONSIDERATION

Plaintiff- — No. 98 CIV 8448(AKH)

AGAINST -

CHRISTIE WHITMAN,
NEW JERSEY ADMINISTRATIVE
OFFICE OF THE COURTS,
PSI TECHNOLOGIES INC.
(POLICY STUDIES INC.),
JEB BUSH,
JOHN DOE, JANE DOE
Defendants.

----------x

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiff, by notice of motion, moves for reconsideration of that aspect of my decision dated December 6, 1999, which dismissed plaintiff's action against defendant Jeb Bush. I held that the Court lacked personal jurisdiction over the State of Florida. Plaintiff argues that 31 U.S.C. § 3732 authorizes the action in this court because of its provision that the action may be brought "in any judicial district in which ... any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729

occurred." Plaintiff argues that he may properly sue the State of Florida here since other defendants may be sued here.

Plaintiff is wrong, and I deny his motion for reconsideration. Jurisdiction over the person must be satisfied against each defendant. United States ex rel. Thistlethwaite v Dowty Woodville Polymer, Ltd. 110 F.3d 861 (2d Cir. 1997). Section 3732 is a statute providing for venue, and cannot be used to evade jurisdictional requirements. Id. Plaintiff has not shown any jurisdictional nexus to justify suing the State of Florida in the United States District Court of the Southern District of New York.

SO ORDERED.

Dated: New York, New York
December 28, 1999

/s
ALVIN K. HELLERSTEIN
United States District Judge

United States District Court
Southern District New York

----------x

UNITED STATES, ex rel. IRWIN EISENSTEIN

DISMISSAL ORDER

Plaintiff- No. 98 CIV 8448(AKH)

-AGAINST -

CHRISTIE WHITMAN,
NEW JERSEY ADMINISTRATIVE
OFFICE OF THE COURTS,
PSI TECHNOLOGIES INC.
(POLICY STUDIES INC.),
JEB BUSH,
JOHN DOE, JANE DOE
Defendants.

----------x

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiff has sued various parties, in the name of the United States, to recover overpayments of child support under the False Claims Act, 31 U.S.C. § 3729 et seq. Plaintiff alleges that the States of New Jersey and Florida, among others, systematically over-collect child support payments from spouses not having custody of their children "to the detriment of the Federal Government" Am. Compl. ¶ 244.

I have previously held, in the course of argument of a motion to dismiss brought by the State of Florida, and

in an ensuing order summarizing my ruling, and again in response to plaintiff's motion for reconsideration, that this court lacked jurisdiction over Florida Governor Jeb Bush and the State of Florida. Transcript of Argument, December 3, 1999; Order dated December 6, and 28, 1999.

Governor Christie Whitman and the State of New Jersey now move on grounds similar to those advanced by the State of Florida. I have read the opposition papers filed by Plaintiff, and I come to the same decision, with respect to Defendant Whitman and the State of New Jersey, as I held with respect to Governor Jeb Bush and the State of Florida. This court lacks Jurisdiction over New Jersey and its Governor. 31 U.S.C. Court for the

Page 1 of the Order

Southern District of New York.

SO ORDERED.

Dated: New York, New York
December 28, 1999

/s ALVIN K. HELLERSTEIN
United States District Judge

United States District Court
Southern District New York

----------x

UNITED STATES, ex rel. IRWIN R. EISENSTEIN

ORDER CONFIRMING DISMISSAL OF COMPLAINT

Plaintiff- No. 98 CIV 8448(AKH)

AGAINST -

CHRISTIE WHITMAN,
NEW JERSEY ADMINISTRATIVE
OFFICE OF THE COURTS,
PSI TECHNOLOGIES INC.
(POLICY STUDIES INC.),
JEB BUSH,
JOHN DOE, JANE DOE
Defendants.

----------x

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiff Irwin Eisenstein makes a second motion for reconsideration of my order dated December 3, 1999, dismissing the action against defendants PSI and Bush, and a motion for reconsideration of my order dated December 29, 1999, dismissing the action against defendant Whitman. I have again considered plaintiff's arguments, and I adhere to my decisions.

Plaintiff again contends that section 3732 of the False Claims Act, 31 U.S.C. § 3732, creates jurisdiction against

a State that is not present or doing or transacting business in this district, merely because another defendant can be sued in this district. Again, plaintiff has conflated requirements of jurisdiction and venue. Neither a State, nor any other defendant, can be dragged to court in a foreign jurisdiction unless the State has established presence, or has transacted business, in the foreign jurisdiction sufficient to be served and sued in that jurisdiction. Fed. R. Civ. Pro. 4; N.Y. Civil Practice Law and Rules § 302 (McKinney 1990). Neither the State of Florida (in the person of its Governor, Jeb Bush) nor the State of New Jersey (in the person of its Governor, Christie Whitman), has established such presence, or has

End Page 1

transacted business, the Southern District of New York. New Jersey and Florida are not subject to suit in New York. The issue of venue is not reached until jurisdiction is satisfied. United States v. Laird, 412 F. 2d 16, 20 (2d Cir.)("jurisdiction must first be found over subject matter and the persons involved in the cause before the question of venue can be properly reached"). cert denied. 396 U.S. 918 (U.S.L.W. Nov. 10, 1969).

Plaintiff's action is a qui tam action. His theory is that states routinely over-collect child support payments from errant fathers and that, since federal contributions to state programs vary directly with state collections, the states have defrauded the federal government, and plaintiff may sue on behalf of the federal government to cause the states to make refund to the United States. See Child Support Enforcement act, 42 U.S.C. § 651 et seq.; Child Support Standards

Act, N.Y. Dom. Rel. Law § 240 (McKinney 1990), N.J. R. Ch. Div. Fam. Pt. R. 5:6A. Furthermore, plaintiff contends, states (including New Jersey and Florida) can pursue errant fathers in New York, Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738; Uniform Reciprocal Enforcement of Support Act; Uniform Interstate Fam. Ct. Act art. 5B ((McKinney 1990), and that this feature of the law brings the distant state into New York for purpose of jurisdiction.

The argument is without merit. Proceedings for child support in New York against an errant parent who is found in this state, on behalf of a custodial parent in a distant state, are brought by the state of New York. See e.g., Deadbeat Parents Punishment Act of 1998, 18 U.S.C. § 228 (West Supp. 1999). The state of the custodial parent does not appear here, and cannot be sued here.

Finally, plaintiff asks me to transfer this case to the states of New Jersey and Florida. I decline to do so, and 28 U.S.C. § 1406 does not require me to do so. See e.g. Graieda v Aeroil Products Co., No 96 Civ. 534, 1999 WL 756507 at 3*(S.D.N.Y. Sept. 23, 1999)("[w]hether dismissal or transfer is appropriate following a determination of improper venue lies within the sound discretion of the district court."). No discovery proceedings have been had in this action, and there is no reason why there should not be a dismissal, allowing plaintiff to proceed in whatever forum in which he can establish jurisdiction and a claim of right.

SO ORDERED. Dated: New York, New York
January 31, 2000

/s ALVIN K. HELLERSTEIN
United States District Judge

Appendix C **Page**

Letter from Policy Studies about cost of Child maintenance for the Non-custodial parent
Dated: December 16, 1996 25

Appendix C

This is a copy of the letter sent by Robert Williams, President of Policy Studies Inc. The original was copied from the Internet and was included in submissions to the Appellate court.

December 16, 1996
Barbara Sanders
Assistant Deputy Director
Office of Child Support Enforcement
Office Department of Human Services
30 East Broad Street, 30th Floor
Columbus, Ohio 43266-0423

Dear Barb:

In our recent conversation, you indicated that there was some question whether Ohio's child support guidelines have incorporated any adjustment for the amount of visitation that was considered "normal", e.g. 20 percent of the time. In addition, you asked that we provide you with information concerning shared custody and visitation adjustments in other states.

Regarding the question on the current Ohio guidelines, the economic basis for the current guidelines does not include any adjustment for visitation of any kind. Because the Schedule is based on expenditures for children in intact households, there is no assumption made concerning visitation costs. Instead, the guidelines are based on the estimated proportion of parental income that would

have been spent on the child if the household were intact. No further adjustment has been made to reflect changes to estimated child-rearing costs based on the amount of visitation exercised by the non-custodial parent.

We understand a perception exists that the current guidelines are predicated on the assumption that visitation is exercised for 20 percent of the time. We do not believe that this perception is correct. We have reviewed our files back to the development of the original guidelines in 1986 and we can find no discussion on this issue in earlier communications or notes. The only plausible explanation we can offer for this perception is that we did discuss a time-sharing threshold of 25-30 percent for applying a shared custody adjustment. Perhaps, it was misconstrued from this discussion that below this threshold, visitation costs were already built into the guidelines.

Generally, states have not made a formulaic adjustment for visitation costs in their guidelines because such costs are highly variable. At a 10 percent visitation level, for example, some non-custodial parents might provide an extra room for the child, while others might roll out a sleeping bag or fold out a couch. Moreover, there are duplicated costs involved with visitation. Although variable costs such as food are reduced for the custodial parent when visitation is exercised, both parents may incur fixed costs such as housing, home furnishings, utilities, and transportation. These considerations make design of an equitable visitation adjustment quite challenging.

Despite the inherent difficulty of designing a visitation adjustment, a few states are addressing this issue. In addition, many states have adjustments for shared physical custody. The latter issue, shared physical custody, was analyzed in a prior report that we prepared for Ohio in 1993, and there have been very few changes in state practices since then.

Nonetheless, we are enclosing a copy of the chapter from the earlier report in the event that it might still be useful. Sections II and III of the report, Analysis of Selected Factors Related to Child Support Guidelines, lists which states allowed deviation or had formulaic adjustments for shared custody and visitation in 1993. This report also describes the different approaches used for these formulaic adjustments.

We also thought the following more recent information pertaining to visitation adjustments could be useful.

- Copies of new visitation and shared custody adjustments for New Jersey and Arizona.

- Although we have not had the opportunity to analyze these new approaches fully, we did provide some preliminary analysis for Arizona. This analysis is contained in Chapter VI of the enclosed report, Economic Basis for Updated Child Support Schedule State of Arizona.

We hope this information is useful in your deliberations concerning visitation and/or shared

custody. If you need clarification or further information, please call me or Jane Venohr, Research Analyst. I am looking forward to working with you on guidelines issues in 1997.

Sincerely,
Robert G. Williams, Ph.D.
President
/s